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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-646

JOSEPHUS REYNOLDS, et al.,
Petitioners,

vs.

ROBERT W. PASTER, etc., et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO "PETITION FOR WRIT OF CERTIORARI"

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Come now respondents Robert W. Paster, Phillip J. Paster, James M. Hornback and James F. Hornback, plaintiffs in the original action before the St. Louis County, Missouri Circuit Court and successful appellants before the Missouri Supreme Court, and pursuant to Rule 24 of this Honorable Court file this, their "Brief" in opposition to the granting of a writ of certiorari in this cause.

ARGUMENT

It should be noted from the outset that considerations governing the review of a writ of certiorari, as herein sought by petitioners, are delineated in Rule 19 of this Honorable Court. The parameters of said rule are neither met nor even approached, directly or indirectly, by the recent ruling of the Supreme Court of Missouri in *Paster*, etc., et al. v. *Tussey*, et al., 512 S.W.2d 97 (Mo. 1974). (Appendix B to petitioners' "Petition for Writ of Certiorari to the Supreme Court of Missouri" [P.W.C.], pp. A25-A62).

The decision of the Missouri Supreme Court did not decide any federal questions, much less federal questions of substance. In fact, the Missouri Supreme Court was extremely circumspect in avoiding involvement with federal constitutional questions and based their decision exclusively and intentionally upon interpretation and construction of the Missouri State Constitution (1945). These interpretations and constructions are those as formulated by the highest judicial body of the State of Missouri. (Missouri Constitution [1945], Article V, Section 2).

Both of petitioners' "Questions Presented" (P.W.C. p. 4) are based upon two erroneous premises. The first such premise upon which petitioners heavily rely throughout is that under the Missouri Supreme Court's ruling, "Children of non-sectarian, nonpublic schools are eligible." (P.W.C. p. 17). In total reliance upon this thesis, petitioners have attempted to fabricate two interdependent theories of relief, based upon a tortured construction of the first and fourteenth amendments to the federal constitution.

Those portions of the "Missouri Textbook Law", Section 170.051, Revised Statutes of Missouri (1973) (P.W.C. pp. 6-8) voided by the Missouri Supreme Court resulted in the elimination of the loan of textbooks to all nonpublic school

pupils; because some of said nonpublic school pupil recipients were of a denominational and sectarian nature, thereby violating the Missouri Constitution (1945). The Missouri Supreme Court did not, as petitioners contend, vitiate only textbook loans to sectarian affiliated nonpublic pupils, while permitting the continuing loan of textbooks to nonsectarian nonpublic pupils. The language of the court in this regard is unequivocal and applies to all nonpublic teachers and pupils, not merely those with a sectarian affiliation.

> "1. That portion of Section 170.051, subpara. 4, requiring public school boards to provide textbooks to teachers in *private schools* 'upon their request' is violative of Art. I, Section 6 of the Missouri Constitution . . .
>
> 2. Those portions of Section 170.051 requiring public school boards to provide textbooks to pupils attending *private schools* are violative of Art. IX, Section 8, of the Missouri Constitution . . ." (Emphasis supplied). (512 S.W.2d at p. 104). (P.W.C. p. A43).

Even assuming the Missouri Supreme Court had, in fact, only prohibited the loan of textbooks to sectarian affiliated nonpublic pupils, such ruling would nevertheless fully conform to federal constitutional standards, in accord with recent decisions of this Honorable Court as more expansively discussed, *infra*.

Two separate and recent cases resolutely decide the issues raised by petitioners. Both cases not only arose within Missouri but dealt with the Missouri constitutional provisions here involved. These cases, both cited by petitioners, are *Brusca*, et al. v. *State of Missouri* ex rel. *State Board of Education*, et al., 332 F.Supp. 275 (E.D.Mo. 1971), *affirmed*, 405 U.S. 1050 (1972), and *Luetkemeyer*, et al. v. *Kaufmann*, et al., 364 F. Supp. 376 (W.D.Mo. 1973), *affirmed*, — U.S. — (1974), 43 L.W. 3230 (Oct. 21, 1974).

Petitioners' second fallacious premise is to have chosen for dual reasons to discount these binding, analogous and applicable decisions because in petitioners' words,

> "Unlike *Brusca* and *Luetkemeyer*, here we are dealing with the withdrawal of legislatively granted services.
>
> This court summarily disposed of *Brusca* and *Luetkemeyer*. Thus they are a very limited guidance to the states as they deal with the complex problems of preserving Free Exercise while avoiding Establishment." (P.W.C. p. 14).

The fact that *Brusca, supra,* and *Luetkemeyer, supra,* concerned state practices which accorded public schools and pupils greater services and state supported benefits than those accorded nonpublic schools and pupils, while this cause involves identical differences operating under authority of state constitutional provision, as opposed to mere practice, is not a legally valid distinction. Nonlegislative acts and acts under color of state law or constitution have always been subject to and held equally accountable under federal constitutional standards. State legislative or constitutional imprimatur have never allowed a lesser application of federal constitutional muster and review.

Secondly, petitioners draw an unwarranted conclusion from this Honorable Court's affirmances in *Brusca, supra,* and *Leutkemeyer, supra.* Petitioners argue that such summary affirmances offer little precedence here; an argument that totally ignores the lengthy and well-reasoned, affirmed decisions by the respective three judge panels in those cases at the district court level. The action by this Honorable Court in *Brusca, supra,* and *Leutkemeyer, supra,* is much more an indication of the total lack of federal question substance as regards petitioners' arguments than it is an indication of slight precedential value, as argued by petitioners.

The court in *Brusca, supra,* was specifically faced with the question of whether or not Article IX, Section 8 of the Missouri

Constitution (1945) (P.W.C. pp. 5-6) in its application violated the first and fourteenth amendments to the federal constitution. The panel unanimously held it did not.

> "By their State Constitution, the people of Missouri have decided that they will not permit the use of state funds, directly or indirectly, in aid of religion or religious institutions. These provisions expressing the public policy of Missouri, are a bar to any financial assistance to plaintiffs unless they are held violative of either the Free Exercise Clause of the First Amendment or the Equal Protection guaranty of the Fourteenth Amendment.
>
> . . . a parent's right to choose a religious private school for his children may not be equated with a right to insist that the state is compelled to finance his child's non-public school education in whole or in part in order that he may obtain a religious education.[2]
>
> [2] . . . Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060, held no more than that a state may, *not that it must*, adopt a program for the purpose of furthering educational opportunities for the young under which secular textbooks are loaned free of charge to children attending parochial and other private schools." (332 F.Supp. at p. 277).

"Faced with this decision, plaintiffs now argue that some alternative program, such as tuition grants, could conceivably be devised which, so they contend, would be free of government entanglement. Wholly apart from the fact that 'entanglement' comparable to that described in *Lemon* cannot realistically be avoided if plaintiffs are granted aid for parochial school purposes, particularly on a continuing basis, if is self-evident that both the purpose and effect of any statute appropriating tax-raised funds to assist parents in the 'free exercise of their religion' would necessarily be to support religion." (332 F.Supp. at p. 278).

"Plaintiffs further contend that the provisions of the Missouri Constitution and statutes which limit the use of tax-

raised funds to the State's public schools are violative of the Equal Protection Clause of the Fourteenth Amendment. We do not agree.

We find nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction. So long as no invidious discrimination exists, the courts may not interfere." (332 F.Supp. at p. 279).

While *Brusca, supra,* dealt generally with the granting of equal aid and support across the board to nonpublic school pupils and parents, *Luetkemeyer, supra,* dealt specifically with the singular issue of busing. The court in *Luetkemeyer, supra,* had little difficulty in disposing of the plaintiffs' arguments of "child benefit," equal protection and due process; the same arguments advanced here by petitioners.

"The 'child benefit' theory must be considered in the context of the cases which required the Court to define permissible areas of State aid to religious institutions. The language of those cases may not be taken out of context to support the notion that a State *must* provide transportation for all pupils, regardless of whether they attend a religious or public school. We do not suggest that the fact that state benefits are distributed to children rather than to schools, and the fact that the benefit is essentially non-religious in character may not be relevant in regard to proper analysis of other constitutional questions presented in this case; we conclude only that the 'child benefit theory,' as set out in *Everson* and *Allen,* standing alone, does not support plaintiffs' basic contention.

. . .

Plaintiffs contend that the transportation of school children is part of a comprehensive statutory and regulatory scheme designed to provide for the safety and welfare of

children traveling to and from school. Plaintiffs argue that the fact that this public service is denied to the plaintiff children solely because they are enrolled in a nonpublic school 'is an arbitrary and unreasonable classification and unconstitutionally denies plaintiffs equal protection of the laws' as prohibited by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs argue further that the classification involved is invidious because it infringes upon plaintiffs' fundamental right to select the school of their choice and to freely exercise their religion and that, therefore, a compelling state interest must be shown to justify the classification.

. . .

If one's right to a public school education is not within the protection of the Constitution, certainly it cannot be said that one has a federally protected constitutional right to a parochial school education, nor a federally protected constitutional right to receive free public transportation to and from parochial schools." (364 F.Supp. at pp. 381-382).

"We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional power,' . . .

That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States. We likewise find and conclude that Missouri's interest in that subject is within Missouri's constitutional power and that such interest may properly be described as an 'interest of the highest order' within the meaning of *Yoder* and within the meaning of all the other vari-

ous descriptive terms set forth in United States v. O'Brien above quoted.

> *The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question.* The Supreme Court has clearly indicated that there is an area of activity which falls between the Establishment Clause and the Free Exercise Clause in which action by a State will not violate the former nor inaction, the latter." (Emphasis supplied). (364 F.Supp. at p. 386).

As this Honorable Court has held, "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 673 (1970).

In 1947 this Honorable Court unanimously applied the first amendment religion clauses to the states, via the fourteenth amendment and in a five to four ruling went on to hold that public state funds could be utilized to provide bus transportation of children to nonpublic schools. *Everson* v. *Board of Education*, et al., 330 U.S. 1 (1947). Six years later the Missouri Supreme Court in an unanimous decision held that the public busing of nonpublic school pupils violated the Missouri Constitution (1945). *McVey*, et al. v. *Hawkins*, et al., 258 S.W. 2d 927 (Mo. 1953).

Although this Honorable Court has sustained the textbook loan program of the state of New York under federal constitutional provisions (*Board of Education of Central School District No. 1*, et al. v. *Allen*, et al., 392 U.S. 236 [1968]), the Missouri Supreme Court has found the statute herein challenged to violate the state constitutional mandates. In fact, on each and every occasion prior to this cause, the Missouri Supreme Court has,

without exception, unanimously prohibited the use of public funds for nonpublic education. (See, *Harfst*, et al. v. *Hoegen*, et al., 163 S.W.2d 609 [Mo. 1942]; *Berghorn*, et al. v. *Reorganized School District No. 8, Franklin County*, et al., 260 S.W.2d 573 [Mo. 1953]; *McVey*, et al. v. *Hawkins*, et al., 258 S.W.2d 927 [Mo. 1953]; and *The Special District for the Education and Training of Handicapped Children of St. Louis County, Missouri* v. *Wheeler*, et al., 408 S.W.2d 60 [Mo. 1966]).

Allen, supra, while appearing at first glance to be relevant to the case at bar, is not and closer examination reveals its distinguishing features.

Allen differs from the present case in many important aspects. First are statutory variances. The New York statute in *Allen* (N.Y. Education Law, Section 701 [1967 Supp.]) provided that the books to be "loaned" "shall be textbooks which are designated for use in any public schools of the state . . . or are approved by . . . (public) school authorities" and the "loans" were made only to *children* enrolled in public or private schools. Distinctively and critically different was Section 170.051, R.S. Mo. (1972), which provided "loans" free to pupils *and teachers* and did not require that the books be presently used in the public schools or receive prior approval and/or inspection by any public school or other public authorities. The statute merely contained the perfunctory prohibition that "(n)o textbooks shall be purchased or loaned under this section *to be used* in any form of religious instruction or worship" (emphasis supplied), and was void of enforcement authority or machinery. It was hardly sufficient in view of human nature, common experience and the *Allen* experience, described *infra*, to assume blithely that public school boards would not purchase books with impermissible content, when the statute, *per se*, did not prohibit such purchases and funds for enforcement were not provided. Instead the statute was a simple mandate that the public school board "shall purchase and loan" whatever books were requested, which was

coupled with a simple prohibition that such textbooks were not "to be used in any form of religious instruction or worship." (Section 170.051, subsections 2 and 6, R.S. Mo. [1972]).

Secondly, the "entanglement" test originated by the Supreme Court in *Walz, supra,* at page 674 and deemed so singularly important in *Lemon* et al. *Kurtzman,* 403 U.S. 602 (1971), was post-*Allen* and therefore not a consideration in that landmark decision. The Supreme Court in deciding *Allen, supra,* took great pains to note that,

> "Books are furnished at the *request of the pupil* and ownership remains, at least technically, in the State. Thus, no funds or books are furnished to parochial schools, and the *financial benefit is to parents and children, not to schools.* * * * Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval." (Emphasis supplied.) 392 U.S. at pp. 243-245.

The Supreme Court in *Lemon, supra,* noted,

> "This factor distinguishes both Everson and Allen, for in both those cases the Court was careful to point out that *state aid was provided to the student and his parents*—not to the church-related school." (Emphasis supplied.) 403 U.S. at p. 621.

Surely, the non-public school teacher is but a natural instrument and an extension of the employing non-public school and cannot be considered as being synonymous with the student and his parents.

It is these very differences in the challenged Missouri statutes: to-wit, providing textbooks at the request of non-public school *teachers* (Section 170.051, subsection 4, R.S. Mo. [1972]), and the mere prohibition against the use of such textbooks in any

form of religious instruction or worship; that manifestly on their face violated the entanglement proscription of *Lemon, supra.* Not only was direct aid to non-public school teachers afforded but the state could have insured conformity of loaned textbook utilization within the statutory restriction, only through on-site inspections of non-public school practices, teachings and curriculum, thereby, necessarily engaging in the very entanglement proscribed.

The Supreme Court in *Lemon, supra,* in discussing its finding of entanglement, stated,

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. * * * These prophylactic contacts will involve excessive and enduring entanglement between state and church. * * * we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." 403 U.S. at pp. 619-620.

The United States Sixth Circuit Court of Appeals in *Protestants and Other Americans United for Separation of Church and State,* et al. v. *United States,* et al., 435 F.2d 627 (6th Cir. 1970), *cert. denied,* post-*Lemon,* 403 U.S. 955 (1971) made note of the distinctions discussed above between grants which financially assist the private educational system (teachers) and grants to students. (*Id.* at 629). Moreover, the Court in that case strictly limited the applicability of the *Allen* case to its specific facts and, indeed, cast serious doubts on the continued validity of *Allen, supra,* by emphasizing the fact that the entanglement test had not been established when the *Allen* case was decided. (*Id.* at 629)).

Thirdly, the New York Constitution, Article XI, Section 3, at issue in *Allen, supra,* was not comparable to the numerous

and varied constitutional provisions of the Missouri Constitution, violated by the challenged statutes and set out in part, *supra*, under "Constitutional and Statutory Provisions Involved." (P. W. C. pp. 5-6). Lastly, it was noted in the *Allen* decision that nothing had been shown in the record contrary to the stated purpose of the statute. (392 U.S. at p. 243). The Missouri statutes contained no such stated purpose.

Last is the tragic failure of the *Allen* statute in practice, as best related in an article entitled, "Sectarian Books, The Supreme Court and the Establishment Clause," 79 *Yale Law Journal* 111 (Nov. 1969).

In unequivocal terms this Honorable Court, speaking through Chief Justice Burger, stated,

> "A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expenses is borne by the State, the economic consequence is to give aid to the enterprise;" (*Norwood*, et al. v. *Harrison*, et al., 413 U.S. 455, 463-464 [1973]).

Petitioners frequently refer to the allegation that prior to the challenged statute's enactment, "all petitioners paid for their own textbooks" (P.W.C. p. 10; see, also, p. 18). This is simply not true. Petitioners' own witness, plaintiff Dora Fine, testified that the textbooks for her children attending a sectarian nonpublic school are provided free of charge by the school. (Transcript page 221, lines 19-24).

Petitioners consistently choose to ignore the basic freedom of choice with which they are presented: A free non-sectarian public education or a sectarian private education in regard to which the state has scrupulously avoided supporting. Having chosen the latter, petitioners can not equitably demand all the benefits of the former.

The consistent post-*Allen, supra,* retrenchment by this Honorable Court, the absence under the challenged statute of prior approval of textbook loans, the consequential necessity of on-site inspection and review to ensure statutory compliance, the necessitated creation of undue entanglement between government and religion as formulated post-*Allen, supra,* in *Walz, supra,* and the second poisoned prong of entanglement, political divisiveness, as enunciated by the Honorable Court in *Lemon, supra,* all heavily weigh against the improvident granting of a writ of certiorari, as herein sought by petitioners.

Wherefore, respondents respectfully pray that petitioners' "Petition for Writ of Certiorari to the Supreme Court of Missouri" be denied forthwith.

Respectfully submitted

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